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# Supreme Court of the United States

## OCTOBER TERM, 1947

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ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES M. SCHWABACHER, ET AL.,
*Appellants,*

*vs.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

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**Appeal from the District Court of the United States for the Eastern District of Virginia**

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## BRIEF FOR APPELLANTS

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WILSON - EPES PRINTING CO. - RE 6008 - WASHINGTON 1, D. C.

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# Supreme Court of the United States

**OCTOBER TERM, 1947**

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**No. 258**

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ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES M. SCHWABACHER, MAY K. SCHWABACHER, ETHEL S. SOKOLOW, and JOHN L. SCHWABACHER,
*Appellants,*

*vs.*

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ET AL.

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**Appeal from the District Court of the United States for the Eastern District of Virginia**

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## BRIEF FOR APPELLANTS

---

### Opinion Below

The opinion of the specially constituted three-judge district court (R. 254-255) is reported at 72 F. Supp. 560. Since the case is required by statute to be instituted in that court originally and comes here by direct appeal, there were no proceedings in any other court.

## Jurisdiction

The final judgment, here for review on appeal, was entered on June 16, 1947 (R. 257), in the District Court of the United States for the Eastern District of Virginia by a statutory court consisting of one Circuit and two District Judges specially convoked under the provisions of 28 U. S. C. 47. Upon pleadings and argument a temporary stay was denied (R. 256, 251) and the cause was submitted for final decision (R. 195, 251-252). After entry of the final judgment of dismissal (R. 257) this appeal followed pursuant to the express provisions of 28 U. S. C. 47a and 345. The petition for appeal was filed July 22, 1947 (R. 257). Appellees filed motions to affirm, but this Court noted probable jurisdiction on October 13, 1947 (R. 267). The jurisdiction of the Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219-221, 28 U. S. C. 45, 47a, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345).

## Question Presented

The single question presented by this appeal is: In approving a plan for the merger of two railroads under a statute vesting it with "exclusive and plenary" authority, did the Interstate Commerce Commission unlawfully decline to take jurisdiction of an issue as to impairment of preferred shareholders' rights by the terms of merger so approved? The Commission thereby refused to recognize the rights of appellants, as holders of preferred stock in the railroad corporation dissolved by the merger, to equities arising under its corporate charter by virtue of accrued but unpaid dividends.

## Statutes Involved

The portions of the Interstate Commerce Act (49 U. S.

C.), as amended, which are pertinent to the present controversy are as follows (emphasis supplied):

§ 5. *Combinations and consolidations of carriers.* • • •
(2) *Unifications, mergers, and acquisitions of control.*

(a) It shall be lawful with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership • • •

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission • • • shall afford reasonable opportunity for interested parties to be heard. • • • If the Commission finds that, subject to such *terms and conditions* and such modifications as it shall find to be *just and reasonable*, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the *terms and conditions, and with the modifications*, so found to be *just and reasonable.* • • •

(11) *Plenary nature of authority under section.*

The authority conferred by this section shall be *exclusive and plenary*, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have *full power* (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such

purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. (Sept. 18, 1940, ch. 722, title I, § 7, 54 Stat. 985.)

* * * * *

§ 20a *Securities of carriers: issuance, etc.*

(2) *Issuance of securities; assumption of obligations; authorization.*

* * * It shall be unlawful for any carrier * * * to assume any obligation or liability * * * in respect of the securities of any other person, natural or artificial * * * unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission * * * of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. * * *

(3) *Scope of Commission's authority.*

The Commission * * * may from time to time, for good cause shown, make such *supplemental orders* in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied * * *

(7) *Jurisdiction of Commission as exclusive and plenary.*

The jurisdiction conferred upon the Commission by this section shall be *exclusive and plenary*, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein. * * *

(11) *Securities issued contrary to law void; effect; penalty.*

Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters *preceding* the entry of such order of authorization. (Feb. 4, 1887, ch. 104, part I, § 20a as added Feb. 28, 1920, ch. 91, § 439, 41 Stat. 494, and amended Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

## Statement

This appeal is prosecuted from a final judgment (R. 257) which dismissed appellants' complaint (R. 1 *et seq.*) seeking to enjoin an order of the Interstate Commerce Commission which approved an application for the merger of the Chesapeake and Ohio Railway Company and the Pere Marquette Company under the terms of the Interstate Commerce Act as amended. See 49 U. S. C. 5 (2) and (11) and 20a (2), (3), (7), and(11). The ground for relief was that the Commission had failed to perform its statutory duty in approving the proposed merger agreement in that it expressly declined to determine or recognize the rights of dissenting preferred shareholders or to protect their equities arising from accruals of unpaid dividends (R. 52-56). The Chesapeake and Ohio Railway Company, Pere Marquette Railway Company, and Alleghany Corporation as well as certain shareholders were permitted to intervene in support of the Commission's order (R. 181-186, 190-191, 192). The three-judge court sustained the Commission (R. 254-255) and this appeal followed.

On March 8, 1946, the Chesapeake and Ohio Railway Company and the Pere Marquette Railway Company, together with Alleghany Corporation, applied to the Interstate Commerce Commission for authorization to consummate an agreement of merger between the two railway companies (R. 7-9). Their application was filed pursuant to the provisions of Section 5 of the Interstate Commerce Act, as amended, relating to voluntary consolidations, mergers or acquisitions of control of rail carriers and Section 20a of said Act relating to restrictions on the issuance of securities and the assumption of liabilities (49 U. S. C. 5 and 20a). Prior to the filing of the application a majority of the shareholders of each corporation had approved the merger agreement proposed by the management of the companies (R. 17) as required by 49 U. S. C. 5 (11).

Appellants as well as other shareholders filed notices of dissent (R. 2, 3, 49 *et seq.*).

Evidence was taken for the Commission and a proposed report was issued (R. 9, 7). Appellants intervened in the administrative proceedings (R. 2, 7). Exceptions were filed, after which Division 4 of the Commission heard oral argument (R. 7). By its report in Finance Docket 15228 dated April 1, 1947, Division 4 approved the merger as proposed by the railroads (R. 5 *et seq.*) and issued an order on behalf of the Commission to that effect (R. 64-67). Petitions for rehearing were denied by the full Commission (R. 3, 67-68).

In the administrative proceedings appellants had contended that the ratio of stock exchange proposed in the agreement of merger (R. 101 *et seq.*) was not just and reasonable as 49 U. S. C. 5 (2) (b) required. They grounded this contention on the fact that the proposed ratio of exchange violated their contractual and statutory rights as the holders of preferred stock in Pere Marquette under the laws of the State of Michigan where Pere Marquette was incorporated (R. 12) until its existence was terminated by the merger here involved (R. 20, 103). Their stock, which had been issued to and held by them pursuant to the laws of Michigan, was admittedly $100 par value 5 per cent *cumulative* preferred (R. 18). Dividends had been in arrears since 1931, in the sum of at least $72.50 (R. 49; but now more). Their equity under Michigan law was therefore at least $172.50 whereas the merger proposal offered them at most $100 in securities of Chesapeake and Ohio.[1]

[1] The merger agreement provided for an exchange of 4/10 of a share of Chesapeake and Ohio common plus 8/10 of a share of the new Chesapeake and Ohio preferred for each share of Pere Marquette preferred (R. 32). Prior to the merger Chesapeake and Ohio had no outstanding preferred (R. 18). It undertook to issue redeemable preferred, in conversion of the shares of Pere Marquette, with a liquidation price of $100 (R. 23, 27-29). Since Chesapeake and Ohio common was then selling at just under $50, appellants took the value of the securities offered in

On the basis of those figures appellants rightly contended that, if the merger were approved, their equities would be cut down in the exchange by something more than $70 per share. Admittedly Chesapeake and Ohio calculated the ratio for exchange of securities at the then stock market price (R. 39-43) without consideration of the accrued equities or legal priority of the holders of preferred stock (see note 1 *supra*). Appellants claimed the right to their full prior equities in either cash or equivalents. *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 598; *Clearwater* v. *Meredith*, 1 Wall. 25, 39-41. They based that right upon both the corporate charter of Pere Marquette [2]

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exchange to be no more than $100 (4/10 of $50 plus 8/10 of $100). On an optimistic view of greater market value for Chesapeake and Ohio on a rising market, the Commission's report states a possible value in exchange of $111.60 (R. 42). As presently quoted, the actual exchange value under the terms of the merger is now under $90. As to the relevance here of the latter figure, this Court has held that even "predictive" findings may be checked by reference to actual figures thereafter available. *Market Street R. Co.* v. *Commission*, 324 U. S. 548, 561-562.

Since the Commission did not deem itself authorized to consider the issue here presented, it made no findings on the point. As a consequence it is difficult to spell out the relevant facts from a report related to other issues. Presumably this Court will not undertake the burden of doing so. *United States* v. *Chicago etc. R. Co.*, 294 U. S. 499, 505, 511; *Atchison Ry.* v. *United States*, 295 U. S. 193, 201-202; *United States* v. *Pyne*, 313 U. S. 127, 130-131; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489; *Howard Hall Co.* v. *United States*, 315 U. S. 495, 501; *Yonkers* v. *United States*, 320 U. S. 685, 687-688, 689, 691-692; *Eastern-Central Assn.* v. *United States*, 321 U. S. 194, 209-210; *Colorado-Wyoming Co.* v. *Commission*, 324 U. S. 626, 634.

[2] The charter provision respecting Pere Marquette preferred provides for full payment of par plus accrued unpaid dividends (here amounting to at least $172.50 instead of the $100 offered) "in the event of dissolution, liquidation, or winding up of the company, voluntary or involuntary * * * before any amounts are paid to holders of the * * * common stock" (R. 50). Where "stockholders receive their distribution in kind" (that is, in stock) it has been held to be "in fact and law a liquidation of assets" and a "winding up." *Constitutional Co.* v. *United States*, 259 U. S. 156, 177. Likewise, where one Michigan corporation "sells" its assets to a successor, it is a "winding up." *Mason* v. *Pewabic Mining Co.*, 133 U. S. 50, 58, 64. Here the merger agreement itself expressly provides that the corporate existence of the Pere Marquette "will cease" on consummation of the merger (R. 20, 103); and the Michigan statute expressly provides for only one corporation "to survive in the case of a merger" (Michigan Statutes Annotated § 22.233). Consequently, on this ground appellants properly insisted throughout the proceedings that the merger agreement should not be approved unless and until provision had been made for the recognition of their full equity accumulation and legal priority for each share of preferred stock they hold.

and the Michigan merger statute.[3] Therein they raised a familiar issue in federal law, whether administrative or judicial.[4]

Both sections 5 and 20a of the Interstate Commerce Act vest the Commission with "exclusive and plenary" jurisdiction with respect to the merger. Nevertheless on April 1, 1947, the final order of the Commission was promulgated upon the assumption that (R. 54-55, emphasis supplied):

> This does not mean that the Chesapeake & Ohio and the Pere Marquette do not remain free to settle controversies with dissenting stockholders through negotiation and litigation in the courts. * * *
>
> *Whether dissenting stockholders, as members of a class created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette is a question not within our province to decide* * * * Objecting stockholders have the right to

[3] It is expressly recognized that the merger is to be accomplished "under the enabling statutes" of Michigan (R. 16). The pertinent statute of the latter state permitting Pere Marquette to be dissolved and its property merged with the Chesapeake and Ohio provides, as an express condition, that "the debts, liabilities and duties of either company shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it" (Michigan Statutes Annotated, § 22.234). The merger agreement evades this language (R. 20, 103-104). Language similar to that of the Michigan statute quoted in the text was before the Court, and given effect, respecting other forms of liability after a consolidation in *New York, C. & St. L. R. Co.* v. *Frank*, 314 U. S. 360, 361-362; and see both the concurring statement of Mr. Justice Douglas (p. 373) and the Commissioner's own prior decisions reviewed by Mr. Chief Justice Stone (pp. 384-385). Similar language has been construed by the Supreme Court of Michigan (in another of its corporation statutes) in *Sutton* v. *Globe Knitting Works*, 276 Mich. 200, 276 N. W. 815 (1936), where a corporation attempted to eliminate by majority vote redemption rights of preferred stock; and it was held that the state legislature had not and could not authorize such a deprivation of such vested contractual rights (pp. 209-210). By the same token rights to accruals of unpaid dividends, as here involved, may not be divested by vote of the shareholders.

[4] The justiciable nature and the relevance of the issue are the subject of note 5 and point 4 of the argument *infra*. The public importance of the problem is evidenced in an extended study issued by the Securities and Exchange Commission in 1938 pursuant to Section 211 of the Securities Exchange Act of 1934. *Management Plans without Aid of Committees*, being Part VII of the *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees* (Government Printing Office, Washington).

> present their case before two tribunals, both charged with the duty of protecting their interests * * * Possibly the courts may be called upon to determine controversies between dissenting stockholders and their companies. Because of the expense that might be involved, it is necessary that we consider that possibility.

It then concluded that, assuming maximum liability to dissenters to be less than $11,000,000, the sale of stock issuable to them under the merger "together with net current assets to be taken over in the merger, not only should fully reimburse Chesapeake and Ohio, but should exceed substantially, any probable expenditure of cash that it might be required to make in connection with the merger" (R. 55-56).

In refusing injunctive relief the court below held that the Commission's ultimate conclusion of justness and reasonableness of the merger was "based on substantial evidence" (R. 255) despite the fact that the proceeding was upon motion to dismiss on the pleadings and hence the evidence upon which the Commission had relied was not before the court. Compare *United States* v. *Lowden*, 308 U. S. 225, 231. The court also remarked in its opinion that appellants sought "preferential treatment" from the Commission and the court "quite apart from any merit in the grounds of dissent" (R. 255). But no such contention was noted by the Commission (R. 52-56). No such proposition was pleaded in the complaint (R. 2-3 and Exhibit A thereto at R. 52-56). And at the argument all the parties conceded that the issue was whether, or in what forum, the prior equities of the dissenting stockholders of Pere Marquette should be recognized (appellants R. 198-205, 246-251; United States R. 212; Interstate Commerce Commission R. 216; the carriers R. 224, 227, 238-243; and other shareholders R. 246).

## Specification of Errors

The court below erred (R. 259-260, 266):

1. In dismissing the complaint and failing to enjoin the order of the Interstate Commerce Commission.

2. In holding that appellants' rights were protected by said order, in failing to set it aside and require the Commission to take appropriate steps to protect the rights of appellants, and in holding that the Commission had properly found the treatment of shareholders and the assumptions of liability under the merger plan were just, reasonable, and in accord with its statutory duty.

3. In holding that the Commission's jurisdiction was not plenary and exclusive, that any remedy appellants might have lay with other courts in other forms of proceeding, and that appellants as dissenting preferred shareholders were seeking "preferential" treatment "quite apart from any merit in the grounds of dissent".

## Summary of Argument

1. The Commission and the court below have ignored the plain words of the statute as well as its history. The statute provides that the jurisdiction of the Commission shall be not only "exclusive" but "plenary" in merger cases respecting merger plans. These words are to be construed as saying what they obviously mean. Since the language of the statute is plain there is no need for recourse to the history of the legislation, but in any event that history confirms that the jurisdiction conferred upon the Commission was designed to cover the very type of merger issue here involved.

2. The Commission's present position is inconsistent, irrational, and irreconcilable. It asserts that appellants have the right to present their case to "two tribunals" (apparently meaning itself and a reviewing court), but it also disclaims "province" to treat with the issue here pre-

sented. It finds that resort to state laws would "frustrate" national transportation policy, but it invites appellants to settle their controversy in the courts. It meticulously reviews the proposed securities to be issued to assenters, and it even discusses fully rights of dissenters in respects other than here involved; but it avoids the cumulated prior equities of the holders of Pere Marquette preferred. It holds it necessary to determine "that all stockholders of the same class are to be treated alike", but regards itself impotent to correct a wrong done to all alike. It approves assumption of liabilities to dissenting shareholders without determining the full possibilities in that regard. Thus it fails to perform its statutory duty under § 20a as well as § 5.

3. The Commission and the court below have departed from administrative practice and have acted contrary to the course of judicial decision. Heretofore the Commission has expressed grave concern for the protection of minorities in mergers. Upon that background Congress has amended and reenacted the statute. This Court has also held that "exclusive and plenary" means nothing less than primary and complete. *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, 146-150; *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 77-79.

4. The Commission and the court below have failed to recognize and determine a common type of justiciable issue in corporate reorganizations. This Court has said on many occasions that the priorities of various classes of shareholders under a corporate charter must be recognized by courts and agencies which deal with the earnings or assets of their companies. *Otis & Co.* v. *Securities & Exchange Commission*, 323 U. S. 624, 634, and authorities there cited. That rule has also been consistently applied by the Court in reviewing actions by the Interstate Commerce Commission in railroad reorganizations. There is a further reason for meticulous application of the require-

ments in this case because, since Chesapeake and Ohio has long controlled and managed Pere Marquette, the merger plan is not an arms-length arrangement. Finally it is to be noted that the necessity for protecting the cumulative equities of preferred shareholders has been stressed in recent years by those appointed in law for the purpose of exercising regulatory functions over securities issues and other corporate reorganizations.

## ARGUMENT

There is no warrant in law for the action of the Commission or the judgment of the court below. Both are contrary to the statute, inconsistent in the attempted statements of justification, contrary to the course of administrative practice as well as of judicial decision, and ignore a long recognized justiciable issue of public importance.

**1. The Commission and the court below have ignored the plain words of the statute as well as its history.**— The statute provides that the jurisdiction of the Commission is not only "exclusive" but "plenary" both with respect to the approval of mergers (49 U. S. C. 5) and the assumption of liabilities with respect thereto (*id.* § 20a). The basic issue here, therefore, is whether the Commission correctly found it not within its "province to decide" whether appellants' rights as holders of preferred stock in Pere Marquette would be wrongfully impaired in the execution of the proposed merger agreement. These equities were not considered in either the merger agreement or the Commission's report save as the latter held their recognition to be outside its "province" (R. 52-54). The Commission should have either rejected the merger application for failure to satisfy, or have conditioned its approval upon appropriate satisfaction of, appellants' rights as holders of preferred stock with accrued and vested dividend rights in Pere Marquette. Section 5 (2) (b) of the

statute not only expressly authorizes the Commission to impose terms and conditions but section 20a (3) authorizes the Commission to issue supplemental orders at any time "for good cause."

The question here is basically statutory.[5] Congress need not have specified that it conferred "exclusive" jurisdiction, for that would have followed to the extent that

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[5] Of course, if the statute were to be held to permit the Commission to wipe out shareholders' rights notwithstanding there were adequate funds to satisfy them and the merger was wholly voluntary, constitutional issues would arise and the saving clause of 49 U. S. C. 5 (12) would be brought into operation. The "contractual" rights here involved were beyond the authority of a majority of Pere Marquette to change. *Voight* v. *Remick*, 280 Mich. 189, 204, 205, 244 N. W. 446, cert. denied 289 U. S. 756. Such rights of preferred shareholders are vested and binding upon all tribunals. *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 196, 198; *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315, 336, 340-341; *Bedford* v. *Eastern Building and Loan Assn.*, 181 U. S. 227, 240.

In the debates which led to the Transportation Act of 1920, where authority was conferred on the Commission respecting mergers and the issuance of securities, it was recognized that charter rights would not and could not be modified. Thus in the *Hearings* before the Senate Committee on Interstate Commerce, 65th Congress (3d Sess.), January 3 to February 21, 1919, on *Extension of Time for Relinquishment by the Government of Railroads to Corporate Ownership and Control*, v. 1, Senator Underwood was concerned about the exercise of federal powers "to destroy a state institution" (p. 245). Senator Kellogg stated that "the Federal Government could not amend the charter so as to change the form of the stock or anything of that kind" (*id.*). Commissioner Clark stated in response that control over securities issues "would be in no sense a destruction of the creation of the State" (p. 246). But Senator Underwood returned to his "question of prescribing the terms on which a State charter shall operate, or fixing the terms of the operation of a charter secured from one sovereign by another sovereign" (*id.*).

At the House hearings on H. R. 4378, 66th Congress, July-October 1919, there was a demand for compulsory federal incorporation (pp. 1253, 1305-1308) in which the shareholders would have the "same relative interest in the same property", which "would no more change * * * the rights of stockholders * * * than does an act of the legislature that changes the name * * * of a corporation created by it", and in which "all * * * private rights and relations should continue as before". The Senate proposal was for compulsory consolidation of carriers, with an express reservation that contractual rights "shall continue unimpaired" (59 Cong. Rec. 140-141). In the debate on the Senate proposal Senator Cummins stated that "there can not be any disturbance of contractual rights" and that, on purchase or condemnation of a carrier, it would be "the duty of that corporation then to distribute the value of that property * * * in accordance with the rights of * * * shareholders" (*id.* 591-592). The existence of vested contract rights "between the state and the corporation" were recognized (*id.* 226). The House of Representatives declined to go along with the compulsory consolidation proposal. The authority of the Commission was therefore limited to the review of voluntary plans of consolidation.

authority was actually conferred upon the Commission.[6] Even the precise terms indicating the extent of authority conferred need not be examined because here, unlike other statutes, it is expressly provided not only that the authority is "exclusive" but that it is "plenary." The latter means "full; entire; complete; absolute" according to common dictionaries. "There is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen* v. *Ward*, 279 U. S. 337, 339. That these words are abbreviated "does not conceal the purpose". *St. Louis-San Francisco Ry.* v. *Middlekamp*, 256 U. S. 226, 232. "The law uses familiar legal expressions in their familiar legal sense." *Henry* v. *United States*, 251 U. S. 393, 395. It is difficult to conceive, therefore, how this broad, unequivocal, and express language leaves anything to any other forum than the Interstate Commerce Commission as the tribunal of primary resort. Neither the Commission nor the court below has done more than assume the contrary.

Here the "entire history of the legislation" may properly be cited in opposition to the present views of the Commission and the court below. Compare *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 364 *et seq.* Here "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349; and see to the

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[6] *Rice* v. *Chicago Board of Trade*, 331 U. S. 247; *Bethlehem Co.* v. *State Board*, 330 U. S. 767; *Mayo* v. *United States*, 319 U. S. 441; *Penn Dairies* v. *Milk Control Commn.*, 318 U. S. 261; *Parker* v. *Brown*, 317 U. S. 341; *Cloverleaf* v. *Patterson*, 315 U. S. 148. In *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 224, 229, 233-234, the statute provided "exclusive" jurisdiction in the federal agency.

Exclusion of jurisdiction in other tribunals "may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting." *Bethlehem Co.* v. *State Board*, 330 U. S. 767, 772. Although many functions of the Interstate Commerce Commission are provided by statute without specification that they shall be "exclusively" performed by the Commission, this Court has said that "an action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted." *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 142. See also *Transit Commission* v. *United States*, 289 U. S. 121, 129, in which authority over acquisition of trackage rights is held "paramount and * * * necessarily exclusive."

same effect *United States* v. *Whitridge*, 197 U. S. 135, 143. But the language involved is plain, unequivocal, and comprehensive. Consequently there is here no need for resort to the course of legislation or the legislative history for purposes of construction. "The Act speaks for itself with sufficient clarity." *Electric Bond Co.* v. *Comm'n*, 303 U. S. 419, 438. "We are not at liberty to construe language so plain as to need no construction." *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89. "Congressional purpose as manifested by text and context is not rendered doubtful by legislative history." *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 615.

However, nothing in the legislative history detracts in the slightest from the plain sweep of the statutory language. In the issuance of securities, there was demand that the Commission "be the dominant regulatory body" with "exclusive jurisdiction over the issuance of securities" (Senate Hearings, *op. cit.* n. 5 *supra*, p. 727). At the House hearings Commissioner Clark asked that the Commission be given exclusive jurisdiction (on H. R. 4378, 66th Congress, July-October 1919, pp. 34-35, 123) as did others (pp. 1081-1083) but there was a contrary demand for a saving clause respecting state authority (pp. 1631-1633). Congressman Steagall was unsuccessful in attempting to secure an amendment to the latter effect (58 Cong. Rec. 8673 and see also p. 8685). House Report No. 456 of the 66th Congress on H. R. 10453 (November 10, 1919), which became the Transportation Act of 1920, summarized all bills and pointed out that all provided for full control by the Commission over security issues (p. 3 and see chart facing p. 46). Exclusive jurisdiction was proposed for the Commission (*id.* 5). The legislative views as to the approval of voluntary mergers, and the full protection of shareholders therein, were involved with the alternative proposal for compulsory consolidation favored by the Senate as set forth in note 5 *supra*. When the Transportation

Act of 1940 was adopted, the revisions of the merger provisions were designed further to amplify the authority of the Commission (86 Cong. Rec. 10166-10167).

The phrase "exclusive and plenary" has been in 49 U. S. C. 20a since its adoption by the Transportation Act of 1920 (41 Stat. 456, 495). The Transportation Act of 1940 added it to 49 U. S. C. 5 as well (54 Stat. 898, 908). Preceding the 1920 Act, the Commission had long sought authority over security issues. At the hearings before the Senate Committee on Interstate Commerce (*Extension of Time for Relinquishment by the Government of Railroads to Corporate Ownership and Control*, January 3 to February 21, 1919, 65th Congress, 3d Session, v. 1) it successfully began its final drive to secure 49 U. S. C. 20a. It introduced in those hearings excerpts from its annual reports from 1908 through 1918 (pp. 339-344). It called the attention of Congress to its previous pronouncements:

> It is of the utmost importance * * * that railway securities should be safe and conservative investments for the public. (*Consolidation and Combinations of Carriers*, 12 I. C. C. 277, 306.)
>
> It will help if minority stockholders are more watchful of their interests. (*Pere Marquette R. Co. and C. H. & D. Ry. Co.*, 44 I. C. C. 1, 223.)
>
> Stock becomes widely distributed among investors who pay little or no attention to guarding their investments. But this situation, fraught with grave danger to the investing public, is one with which Congress must deal. As the law now is, this commission is powerless * * * to protect * * * stockholders from depredations and losses * * * Private capital invested in carrier companies cannot be generally safe under such lack of security regulation as has existed * * * (*Proposed Increases in New England*, 49 I. C. C. 421, 434.)

Congress then granted the requested authority in 49 U. S. C. 20a, which manifestly has not withered in the intervening

quarter century. The words "exclusive and plenary" came into the statutes "freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion." *Duparquet Co.* v. *Evans*, 297 U. S. 216, 221.

**2. The Commission's present position is inconsistent, irrational, and irreconcilable.**—The Commission's report not only disclaims "province" to determine the question here involved but in the same paragraph inconsistently states that "objecting stockholders have the right to present their case before two tribunals, both charged with the duty of protecting their interests" (R. 54). If the latter is true, the former is untrue. If appellants have a "right to present their case before *two* tribunals" (that is, apparently, the Commission and a reviewing court), then confessedly the Commission has denied them this right by holding any question respecting it to be beyond the Commission's province to decide. The same inconsistency appears in the Commission's statement that "Congress has always had regard for private property involved by requiring us to consider the terms and conditions of unification proposals" (R. 53).

Again the Commission holds it "difficult to conceive of a restraint or limitation on contemplated unifications better serving to frustrate the national transportation policy than the provisions of State laws for compensation of dissenting stockholders on specified bases" (R. 53). But on the next page of its report it invites appellants "to settle controversies * * * through * * * litigation in the courts" (R. 54). These positions are patently inconsistent.

The court below has, moreover, compounded the inconsistencies in the Commission's report. It noted that the Commission had not passed upon the rights of dissenters under state law but had left them "free to settle controversies with dissenting stockholders through negotiation

and litigation in the courts" (R. 54, 255). Asserting that it would "adopt a like course", the court below held that "nothing in our opinion is to be interpreted as in any way determining, affecting or prejudicing these rights" (R. 255). Yet the court only superficially followed the Commission. The latter had declined jurisdiction in favor of "the courts" (R. 54) including apparently the court below as that court itself understood at the argument (R. 204-205). But the court below in turn declined the jurisdiction in favor of unspecified other courts, presumably in some other form of proceeding "under the laws of the several states" (R. 255). The situation here, then, is one in which the Commission (despite inconsistent language to the contrary) has declined jurisdiction in favor of the reviewing court, and the latter has in turn declined it in favor of some other court in some other form of proceeding. Of course, however, the court below was correct in that, if the Commission did not have jurisdiction, then a reviewing court could have no broader jurisdiction (see R. 204-205). Indeed, the latter has more limited powers because, having laid bare some error of law in administrative action, judicial authority is exhausted. *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, 141; 145. Here, therefore, the fundamental error was that of the Commission and the error of the court below lay in not saying so.

Another and even more curious anomaly lies in what the Commission did rather than what it said. It felt obliged to review meticulously the merger treatment of the security rights of those *who assented and agreed to the merger plan*. Thus it analyzed at great length the securities that Chesapeake and Ohio proposed to issue (R. 35; preferred R. 20-29; common R. 29-30), the ratios of exchange proposed (R. 31-35), the then going-market-price basis therefor (R. 39-41-43), and the fairness of the plan so far as holders of Chesapeake and Ohio stock were concerned (R. 48-49). It even reviewed, *in respects other than those*

*material here*, the fairness of the exchange so far as Pere Marquette shareholders were concerned (R. 39-41, 49-52). But, although it had carefully analyzed *all other shareholders' rights* and even took account of the par value of Pere Marquette preferred, *it did not discuss, and found itself without jurisdiction to deal with, the cumulative prior equities of Pere Marquette preferred* (R. 52-55). In that respect, and although it otherwise recognized a duty even "if not a single share be in dissent" (R. 40), it failed to discuss or deal with the full rights of Pere Marquette preferred *whether held by either assenters or dissenters.* The Commission's painstaking review of all other shareholders' rights, in contrast to its studious avoidance of those of both assenters and dissenters in the respect here involved, is supportable in neither reason nor law.

In point of fact the attempt of the dissenters to preserve their rights by dissenting apparently caused the Commission to regard them merely as "members of a class" set apart (R. 54). The Commission there said:

> Our duty in respect to stockholders is complete, in our opinion, when we make certain that all stockholders of the same class are to be treated alike.

Thereby the Commission assumed itself empowered to take corrective action only in the unlikely event that a merger plan capriciously differentiated between holders of the same security. It ignored the fact that, even within a class of security holders, some might waive their rights while others such as appellants were fully entitled to insist upon them. The Commission thus reasoned itself into irrational impotence. It had dealt with the cumulative prior equities of the Pere Marquette preferred stock of neither assenters, abstainers, nor dissenters. It set the dissenters apart but, despite doing so, held itself unable to effectuate their rights because it deemed itself empowered only to "make certain that all stockholders of the same class are to be treated alike" (R. 54). In short,

because the merger plan did not recognize the accrued arrearages due any of the Pere Marquette preferred shareholders, the Commission concluded that it could not act for the benefit of those who had preserved their rights. This very novel assumption is tantamount to saying that, if *all* are wronged, by the same token *none* may recover. Manifestly no public agency and no court of justice should assume, at least in the absence of the strongest proof, that Congress intended any such inexplicable result when it conferred exclusive and plenary authority upon the Commission to determine the justness and reasonableness of merger plans. 49 U. S. C. 5.

The court below, also, seems to have thought that dissenters may not seek to vindicate statutory rights if by such relief they may secure "more favorable treatment than the treatment accorded to stockholders of the same class (holding the same securities) who did *not* dissent but *agreed* to the conditions in the merger agreement" (R. 255, emphasis supplied). But such a rule would simply and manifestly wipe out all rights to dissent from corporate mergers, as the court itself indicated in strong language at the argument (R. 203-204). It found "no support in practical *economics* or in commercial *ethics*" for appellants' attempt to have their property rights recognized (R. 255, emphasis supplied) despite the fact that the issue was not legislative but a justiciable one arising upon the statutes of Michigan and the United States.

Much the same difficulties are shown in the Commission's treatment of its duty under 49 U. S. C. 20a, where it approved in advance and in an indeterminate amount the possible liability of the carriers in the event of successful independent stockholders' suits (R. 55-56). The figures there given, and the means assumed to be sufficient to satisfy such liability, are based upon no real examination into shareholders' rights and remedies. They are limited to such figures as happen to appear in the record documents respecting dissenters (R. 55) and the even smaller

number of shareholders who had requested the special statutory remedy of appraisal under Virginia statutes (R. 56 note 14). But the limitation of potential liability to those who have sought such appraisal, or even to those who have dissented, is based on an unwarranted assumption. The suggested limitation of liability to those dissenters who have sought appraisal under *Virginia* statutes is completely irrelevant so far as the shareholders of Pere Marquette are concerned because the latter hold rights under *Michigan* law.[7] And if for example the remaining vast majority of shareholders can show rights of recovery because of representations made in the proxy statements, the fact that they failed to dissent from the merger may be immaterial.[8] In short, the Commission's

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[7] The cases cited in notes 2 and 3 *supra* illustrate the forms of action applicable apart from special statutory remedies of "appraisal". "Resort to litigation is always a possibility, but such litigation is likely to be expensive and protracted; and its ultimate success will necessarily be a matter of speculation, with the odds weighted heavily in favor of the management." *Op. cit. supra* note 4, p. 112. The same official source sets forth at length the practical inadequacy of the individual stockholder's remedy in a court of equity (pp. 118-119, 336-337, 543-555) as well as the legal insufficiency of statutory appraisal as generally administered (pp. 196, 542, 590-610, and see particularly the conclusions at p. 610). Nevertheless two forms of remedy exist.

The immateriality of Virginia statutes here is plain. As in the case of federal taxation, most rights and liabilities basically arise under local law rather than federal. "Our problem only touches transactions for which rights and obligations are created by one of the States." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 101. See also *Huddleston* v. *Dwyer*, 322 U. S. 232, 236-237. "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 155. Michigan, as the state which created Pere Marquette, determines the nature of property rights of Marquette shareholders. *Jellenik* v. *Huron Copper Mining Co.*, 177 U. S. 1, 12-13; *Hammond* v. *Hastings*, 134 U. S. 401, 404.

[8] Under the heading "Statutory Rights of Dissatisfied Stockholders" the Proxy Statement reads (R. 99): "The statutes of Michigan contain no provision dealing with this subject." For the relevance of the omission to mention the availability of ordinary equitable remedies see notes 2, 3, and 7 *supra*. In this connection two official publications of the Government of the United States deal with the similar problems arising in an earlier phase of the creation of the augmented railroad system here involved. In 1938 the Securities and Exchange Commission issued its report on Reorganization Committees. *Op. cit. supra* note 4. Therein it treats of "plans designed to eliminate arrearages of accumulated dividends on preferred stock" (pp. 109-197), the "elimination of minorities by dissolution, merger or consolidation of other companies" (pp. 294-

action on this phase of the case is based upon no real inquiry into the law, the facts, or the reach of possible liability. It has therefore failed to perform its statutory duty under section 20a of the Interstate Commerce Act. Compare *New York, C. & St. L. R. Co.* v. *Frank*, 314 U. S. 360, 372.

**3. The Commission and the court below have departed from administrative practice and have acted contrary to the course of judicial decision.**—In the past the Commission has not, as in this case, limited its jurisdiction to exclude issues as to minority or dissenting shareholders. In *Unification of Southwestern Lines*, 124 I. C. C. 401, 434, it said:

> We are not impressed by these reasons for the failure to prepare and announce a plan for the protection of minority stock interests. Before we can approve an acquisition of control under paragraph (2) of section 5 we must find that the terms and conditions on which it is to be effected are 'just and reasonable in the premises.' They are not just and reasonable unless they include proper provisions for the protection of minority interests and we can not say that the provisions to be made for such protection are proper until we know what they are, nor prescribe proper provisions in the absence of adequate evidence which will enable us to determine what they ought to be.

See also *Nickel Plate Unification*, 105 I. C. C. 425, 447-448; *New York Central Unification*, 150 I. C. C. 278, 320; *Denver & St. L. Ry. Co. Control*, 252 I. C. C. 153, 195. See *Cleve-*

335), and the "inadequacy of protection afforded minorities by appraisal statutes" (pp. 342-352). It reviews at length the basic rights of shareholders, under state law, on the merits of the controversy here involved. It reviews extensively the "plan of consolidation for the Alleghany Corporation and The Chesapeake Corporation" including the judicial correction (under Maryland law) of the attempt to wipe out accruals on preferred stock and "non-disclosure in soliciting material" (pp. 353-411). See on the same subject Part 10 of the *Investigation of Railroads, Holding Companies, and Affiliated Companies*, Senate Hearings pursuant to S. Res. 71, 75th Congress (1937).

*land, C. C. & St. L. Ry. Co.* v. *Jackson*, 22 F. 2d 509, 511 (CCA 6) for a judicial confirmation of this view. See also *United States v. Lowden*, 308 U. S. 225, note 1 at 233.

Congress has both amended and reenacted the statute here involved, without any other understanding. See the history of 49 U. S. C. 5 and 20a, particularly the comprehensive revision of the Interstate Commerce Act by the Transportation Act of 1940 (54 Stat. 898). In the passage of the latter Congress was expressly aware of the importance and course of administrative interpretation (86 Cong. Rec. 11766) and made changes only for other purposes (*id.* 11768). In these circumstances the Court should be extremely reluctant to find now either a different intention on the part of Congress or a lack of authority in the Commission. See *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116; *Fondren* v. *Commissioner*, 324 U. S. 18, 29-30; *Merchants Bank* v. *Commissioner*, 320 U. S. 256, 260; *Brooks* v. *Dewar*, 313 U. S. 354, 361; *United States* v. *Safety Car Heating Co.*, 297 U. S. 88, 95; *Morrissey* v. *Commissioner*, 296 U. S. 344, 355; *Hartley* v. *Commissioner*, 295 U. S. 216, 220; *Helvering* v. *Bliss*, 293 U. S. 144, 151.

The statute is plain, Congress has steadily amplified the Commission's powers, and the administrative agency itself has heretofore not found itself impoverished of authority in the respects here material. Consequently the federal courts have not heretofore been called upon to determine the precise question here involved. But this Court has plainly indicated that "exclusive and plenary" means nothing less than primary and complete. In *Thompson v. Texas Mexican Ry. Co.*, 328 U. S. 134, 146-150, the Court held that under section 5 (2) (a) of the statute here involved the Commission and "not the courts" had exclusive authority to determine the terms and conditions under which trackage rights may be acquired notwithstanding that they "are consensual arrangements between the parties." In *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 77-79,

the Federal anti-trust authorities were required to present antitrust questions to the Commission in a merger proceeding. If those cases were correctly decided as they undoubtedly were, this Court there necessarily assumed an even broader jurisdiction in the Commission than necessary here to permit it to deal with the issue respecting appellants' rights as shareholders. There are of course subjects which are irrelevant in these merger cases.[9] But here the rights which appellants seek to have recognized by the Commission lie well within its plenary and exclusive jurisdiction over merger terms as such.

**4. The Commission and the court below have failed to recognize and determine a common type of justiciable issue in corporate reorganization cases.**—If the issue here presented is one within the "exclusive and plenary" jurisdiction of the Commission as the statute and the foregoing authorities indicate, then manifestly and admittedly the Commission has unlawfully failed to accord plaintiffs their rights as holders of cumulative preferred stock in Pere Marquette. It has been said by the Court on many occa-

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[9] Attempts have been made to bring within the jurisdiction of the Commission matters completely beyond merger issues. (1) Where the issue raised is a claim of *ultra vires* under state law which is "remote" in the sense that only the state may raise it. *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 26; *Cleveland etc. Ry.* v. *United States*, 275 U. S. 404, 413-414; relying on *Kerfoot* v. *Farmers' & Merchants' Bank*, 218 U. S. 281. (2) Where the shareholder's cause of action is not directly related to the merger transaction. *N. Y. Central Securities Co. v. United States*, *supra*, 28-29, 54 F. 2d 122 at 131; *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, 488, 41 F. 2d 806 at 811. Here, on the other hand, the State of Michigan is at least not the sole party in interest and the merger exchange-of-stock ratio was a principal issue in the merger agreement, in the proceedings before the Commission, and in the court below. In the present case the issue presented is imbedded in, and arises solely from, the terms and conditions of the merger agreement. It is not remote, indirect, or raised by parties who have no standing to do so. Appellants here seek to have recognized their specific property rights represented by stock certificates issued by Pere Marquette under its charter and the laws of Michigan, as against the deprivation thereof through execution of the merger agreement. It is to be noted, moreover, that, if there could otherwise be any question as to the non-applicability of the foregoing cases to the situation here, subsequently Congress amended 49 U. S. C. 5 (11) to provide "exclusive and plenary" jurisdiction in the Commission (54 Stat. 898, 908).

sions that the priorities of various classes of shareholders under a corporate charter must be recognized by courts and agencies which deal with the earnings or assets of their companies. *Otis & Co. v. Securities & Exchange Commission*, 323 U. S. 624, 634, and authorities there cited.

The duty of the Interstate Commerce Commission under section 5 (2) of the Interstate Commerce Act to determine the justness and fairness of merger plans is of the same type as that of the Securities and Exchange Commission under section 11 (e) of the Public Utility Holding Company Act of 1935 to determine the fairness and equitableness of simplification plans. In passing on action by the Securities and Exchange Commission involving a simplification plan, the Court has held that any arrangement or plan enforced without the consent of the parties affected by it, by which the subordinate rights and interests of stockholders are attempted to be secured *at the expense of the prior rights of other security holders*, is unfair and inequitable and will not be judicially sanctioned. In the *Otis* case cited above the Court said (p. 634):

> Like the bankruptcy and reorganization statutes, the Public Utility Holding Company Act, in providing that plans for simplification be "fair and equitable," incorporates the principle of full priority in the treatment to be accorded various classes of security interests. This right to priority in assets which exists between creditors and stockholders, exists also between various classes of stockholders. When by contract as evidenced by charter provisions one class of stockholders is superior to another in its claim against earnings or assets, that superior position must be recognized by courts or agencies which deal with the earnings or assets of such a company. Fairness and equity require this conclusion.

Under this principle of full priority no plan of merger or reorganization in which junior security holders are permitted to participate could be approved or permitted to

stand unless senior security holders received full compensation for their prior rights as established by their contract.

This rule has also been consistently applied by the Court in reviewing actions by the Interstate Commerce Commission in railroad reorganizations. *Case v. Los Angeles Lbr. Co.*, 308 U. S. 106; *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510; *Group of Investors* v. *Milwaukee Ry. Co.*, 318 U. S. 523. No reason has been stated by either the Commission or the court below why it should not apply here. That it should apply in the circumstances of this case appears from the language of the statute, prior administration, legislative policy, and the decisions of this Court. The issue, moreover, is not merely a statutory one, for it is grounded upon constitutional requirements (see the authorities cited in note 5 *supra*).

But there is a further reason for special scrutiny of the merger plan here proposed and approved below. Since 1929 Chesapeake and Ohio had controlled Pere Marquette through ownership of approximately 70% of the latter's common stock, had installed common officers and directors (R. 9-11), and had been "preparing" it for this merger (R. 45). The merger proposal was admittedly not an arms-length agreement even between carrier managements. It therefore required that special care be taken to protect minority interests. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 492; *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 598 *et seq.*[10] "The stories of the dissolutions, mergers, and the consolidation, are striking examples of the manner in which a single dominant interest, having projected it-

[10] While the Commission here otherwise undertook to give the plan "close scrutiny" (R. 54), it wrongfully found the present issue beyond its competence (R. 52-55 and see points 1-3 inclusive of this argument *supra*). It thereby found itself without authority to deal with the very issue found to be important by courts and other tribunals. See *op. cit. supra* note 4. A common object of corporate reorganizations is to eliminate, by one device or another, cumulated arrearages of dividends. *Id.* 123, 125.

self into a situation of control, can thereafter dispose of the interests of minorities almost as it wills." *Op. cit. supra* note 4, p. 294 and see also pp. 114-116, 411, 415. The instant case is an extremely aggravated further example to the execution of which no court or administrative tribunal should lend support. For here the acquiring railroad has long managed Pere Marquette, has exercised its control to withhold the payment of dividends (R. 44-45), has thus caused the accumulation of arrearages it now seeks to wipe out, and as itself a major holder of common stock in Pere Marquette stands to benefit directly in the elimination of the accumulated prior equities to which the preferred shareholders in Pere Marquette would otherwise be entitled.

It is also to be noted that, in recent years, the necessity for protecting the cumulative equities of preferred shareholders has been heavily stressed by those appointed in law for the purpose.

> The provision for accumulation is a persuasive factor in inducing preferred stockholders to invest. (*Op. cit. supra* note 4, pp. 190 *et seq.*)
>
> The fundamental evil in these cases, of course, lies in the delusive character of the provisions in preferred stock for cumulative dividends. (*Id.* 117.)

There is therefore as great a need today for more, rather than less, intensive administration of existing regulatory powers over securities. See *id.* 197 and 413. In that regard, no distinction is to be drawn between railroads and other industrial corporations where securities are widely held.

## CONCLUSION

In this case the ruling of the Commission has spawned confusion. There have been elaborate proceedings before the administrative agency, summary review thereof by a three-judge court, an abortive appraisal proceeding subsequently initiated by Chesapeake and Ohio in the local courts of Virginia (and sought to be removed to the federal court there by appellants), and an invitation by the Commission or the court below for appellants to institute still another proceeding under the laws of Michigan. The situation in this one case shows how completely the "exclusive and plenary" jurisdiction which Congress has conferred upon a federal administrative tribunal may be complicated, confused, and frustrated. Should a bifurcated or trifurcated jurisdiction be approved here, the cause of unification of carriers for the benefit of a national transportation policy will be ill served. Many questions will then border on the several jurisdictions and require a multiplicity of proceedings, which can only serve to deter unifications. These considerations confirm that Congress has wisely provided that the jurisdiction of the Commission shall be not only exclusive but *plenary*. They further demonstrate that the judgment below should be reversed and the cause remanded for proceedings before the Commission in which the rights of appellants shall be appropriately recognized, determined, and effectuated.

Respectfully submitted,

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December 15, 1947.